

\*\*\*UNDER SEAL\*\*\*

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

-----x  
:   
4 UNITED STATES OF AMERICA, : Criminal Action No.  
:   
5 versus : 1:19-dm-50  
:   
6 JOHN DOE 2010RO3793, :   
:   
7 Defendant. : September 11, 2019  
-----x

The above-entitled Show Cause Hearing was heard  
by the Honorable Anthony J. Trenga, United States District  
Judge.

A P P E A R A N C E S

FOR THE GOVERNMENT: GORDON KROMBERG, AUSA  
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OFFICIAL COURT REPORTER: MS. TONIA M. HARRIS, RPR  
United States District Court  
Eastern District of Virginia  
401 Courthouse Square, Fifth Floor  
Alexandria, VA 22314

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1 THE COURT: All right. That motion will be granted  
2 and they'll will be admitted pro hac.

3 MR. ZIMMERMAN: Thank you, Judge.

4 THE COURT: All right. We're here on Mr. Hammond's  
5 motion for a no-show cause why the Government's writ summoning  
6 testimony and this Court's immunity compulsion order shall not  
7 be quashed, stayed, or vacated.

8 I've reviewed the filing as well as the Government's  
9 response. Let me please hear further from counsel.

10 Ms. Kellman.

11 MS. KUNSTLER: Thank you, Your Honor. This is  
12 Ms. Kunstler. First of all, I wanted to move the Court to  
13 appoint Mr. Zimmerman under 2102020. This Court has the  
14 authority to make discretionary appointments under the CJA for  
15 a person charged with civil or criminal contempt to state his  
16 loss of liberty.

17 I understand we're not at that posture yet.

18 THE COURT: Right.

19 MS. KELLMAN: And hopefully will not be.

20 MS. KUNSTLER: Right, right.

21 MS. KELLMAN: But I -- you know, it's also under  
22 (c). I think that was little (b). Under (c), I think, it's  
23 also a witness before the grand jury, Court, Congress, or  
24 federal agency that this Court has authority to appoint  
25 counsel to.

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1           Here, despite asking for it repeatedly, we still  
2 don't have the writ that has brought him here. You know with  
3 respect --

4           MS. KUNSTLER: And Judge, just to be a little more  
5 specific, if we might, in terms of the Government's argument  
6 about eleventh hour maneuvering, I discussed, on more than one  
7 occasion, with government counsel the fact that we were having  
8 difficulty just getting through to the jail where Mr. Hammond  
9 was housed. And in fact, the U.S. Attorney represented to me  
10 that the marshals, U.S. marshals, were having similar  
11 difficulties that nobody was answering the phone at the jail.

12           We also were given an e-mail address and nobody  
13 responded to our e-mail. So we've made diligent efforts to  
14 reach our client. And when we finally reached him and told  
15 him that we would reach out to the government and see what we  
16 could figure out, that's when he told us about RDAP. We  
17 reached out to the Government and we were in the process, I  
18 thought, of trying to arrange to have this interview in  
19 Memphis so that our client would not be prejudiced and be  
20 taken out of the RDAP program, which essentially means he'll  
21 do another, you know, eight to eleven months, I think, in  
22 prison. And it was during the time we're having these  
23 discussions that our client was moved.

24           The last I had heard was the marshals couldn't even  
25 get through to the jail so serve the writ. And then our

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1 here pursuant to a different document, which we haven't seen,  
2 and so, therefore, making arguments about it somewhat blind.  
3 But to the extent this document was a document produced under  
4 18, U.S.C., 3621, we cited in our brief that the legislative  
5 history concerning 621 makes it clear that the purpose of that  
6 statute was only to simplify the administration of the prison  
7 system, and not to alter the authority.

8           So therefore, the same necessity applied -- should  
9 apply to this writ we have not seen, as does the writ for  
10 habeas corpus. There is nothing -- the government cites talks  
11 about the broad powers, the broad investigative powers, but  
12 nothing they have cited contravenes that authority -- that  
13 statutory authority.

14           Now, the Government has said, and I agree, that they  
15 have not had a fulsome opportunity to respond to our brief,  
16 nor have they explained the compelling urgency for  
17 Mr. Hammond's appearance to be before the 6th of September  
18 sitting of this grand jury rather than the October sitting of  
19 this grand jury.

20           I don't think that this Court -- I don't think that  
21 the government has made compelling or sufficient arguments,  
22 but I think they should have time to. We should have time to  
23 respond to those arguments. And this issue -- these are  
24 serious issues involving serious due process rights that  
25 deserve to be briefed, fully briefed and heard. The

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1 Ms. Kunstler: And actually -- this is Sarah  
2 Kunstler again. That's not accurate, I should say. Jeremy  
3 was never able to call us.

4 MS. KELLMAN: He couldn't call us.

5 MS. KUNSTLER: He -- he, you know -- we received an  
6 e-mail over CorrLinks that he had been -- which is not  
7 attorney-client privilege notification -- mode of  
8 communication, and not a way we can comfortably communicate  
9 with our client. So we essentially got an e-mail that they  
10 were -- they had asked him to pack up.

11 So we never had -- we were never able to have a  
12 second conversation with him at all until this Monday when we  
13 met with him at the jail.

14 THE COURT: All right. Anything else?

15 MS. KELLMAN: Could we have just one minute, Judge?

16 THE COURT: Yes.

17 (A pause in the proceedings.)

18 MS. KUNSTLER: The Government has also -- this is  
19 Sarah Kunstler again -- Your Honor, the government has also  
20 argued that we need to establish abuse of the grand jury  
21 process before they should be required to establish necessity.  
22 Again, without citing any authority for that and why  
23 28, U.S.C., 2241 does not apply here.

24 But despite, you know, despite that, we have made a  
25 strong showing of abuse and our showing of abuse here is based

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1 MS. KELLMAN: Your Honor, Susan Kellman, I  
2 apologize, but we lost just Mr. Kromberg's -- the last thing  
3 we heard him say --

4 THE COURT: Ms. Kellman, why don't you hold off.  
5 I'll give you an opportunity to respond after Mr. Kromberg is  
6 done.

7 MS. KELLMAN: Okay.

8 THE COURT: Okay. Mr. Kromberg.

9 MR. KROMBERG: Thank you, Your Honor. That same  
10 case, *R. Enterprises*, said that the law presumes, absent a  
11 strong showing to the contrary, that a grand jury acts within  
12 the legitimate scope of its authority. And that's happened  
13 here.

14 The witnesses -- the witness talks about oh, the law  
15 of writs, and they cite it case after case in their brief  
16 about defendants seeking to writ state prisoners into their  
17 case to testify at trial. That's very different from what we  
18 have here and not least because there's no writ in this case,  
19 no writ.

20 A writ is an order of a Court. There's no writ.  
21 There is a request signed by one of my supervisors in the U.S.  
22 Attorney's Office to the marshal service saying please bring  
23 prisoner Jeremy Hammond to the Alexandria jail. So that's  
24 what we have. It's not a writ. It's a piece of paper with  
25 internal DOJ document, "please bring a prisoner." It has

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1 us he's not going to talk to us." And through whatever the  
2 circumstances were that did not happen.

3 But we, the government, have bent over backwards,  
4 and we've done as much as we can to make this happen with the  
5 minimal intrusion into the witness's circumstances as  
6 possible. Whatever has happened between the defense attorneys  
7 and the jail, I don't know. It didn't work out. We've tried  
8 to get this, we scheduled it for grand jury appearance for  
9 September 9th, excuse me, September 10th. And Ms. Kellman  
10 said, "I can't make it September 10th." I said, "Okay, we'll  
11 do it September 11th." And then on last week I said, "Well if  
12 you can't make it September 11th, we can postpone it until  
13 September 12th, but let's just get it done. And if you don't  
14 want to go to the grand jury, let's meet in the conference  
15 room and let's do it. But there's no reason to delay things.  
16 Let's just do it."

17 THE COURT: How long do you anticipate your  
18 questioning would be? I know it's difficult to be completely  
19 precise, but --

20 MR. KROMBERG: Right.

21 THE COURT: -- do you have a general sense of how  
22 long your questioning would be?

23 MR. KROMBERG: A couple of hours, Judge. I reserved  
24 two hours before the grand jury. But, of course, as you  
25 pointed out, it depends if the witness is fulsome and comes

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1 And in that case there was a subpoena and so there  
2 was something for the parties to challenge.

3 THE COURT: All right. Anything else on this?

4 All right. I've reviewed -- I've reviewed the  
5 motion.

6 MS. KELLMAN: And they can't show necessity so all  
7 they can say is we don't have to show necessity. And the  
8 other thing is that without having an opportunity for the  
9 Court to hear us on the issue of whether or not there's really  
10 is any necessity, we didn't have a chance to respond to a  
11 subpoena or to the order. And there are multiple things that  
12 we would respond to --

13 (Telephone disconnection.)

14 THE COURT: Did we get cut off? Hello. We lost the  
15 connection.

16 MS. KELLMAN: -- the jail before we had an  
17 opportunity to talk to them. And once he was in, you know,  
18 FCI arena or Oklahoma we had no ability to talk to him until  
19 he got to Virginia. So I just think the case is, under the  
20 circumstances here, are very, very different from  
21 *R. Enterprises*.

22 The other thing is the government has never, not  
23 even today, said to the Court why tomorrow is the -- is  
24 absolutely necessary when this is a grand jury that's been  
25 sitting for months and months and sits again in October, when

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1 of counsel.

2 In assessing the motion, let me first really comment  
3 on some of the basic, settled propositions that guide the  
4 Court's assessment of Mr. Hammond's motion.

5 The grand jury may compel testimony of witnesses as  
6 it considers appropriate in its operation generally and is  
7 unrestrained by technical procedural or evidentiary rules in  
8 governing the conduct of criminal trials.

9 However, the investigative powers of grand juries  
10 are not unlimited and a grand jury is not licensed to engage  
11 in arbitrary inquiry nor may they select targets of  
12 investigation out of malice with an intent to harass.

13 Here, however, the law presumes, absent a strong  
14 showing to the contrary, that the grand jury acts within a  
15 legitimate scope of its authority, and the compulsion of  
16 testimony before the grand jury is presumed to be reasonable,  
17 and the burden of showing unreasonableness must be on the  
18 recipient who seeks to avoid its compliance.

19 Where an order to testify before a grand jury is  
20 challenged on relevancy grounds, the motion to quash must be  
21 denied unless the district determines that there is no  
22 reasonable possibility that the testimony will produce  
23 information relevant to the general subject of the grand  
24 jury's investigation.

25 And in that regard, the grand jury is entitled to

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1 produced the body that required jurisdiction for that purpose.

2 Here, however, the custody of Mr. Hammond is already  
3 with the attorney general of the United States. Mr. Hammond  
4 was already within that custody and not some third party, such  
5 as a state authority and all that was required was an  
6 administrative order requiring his transfer from one facility  
7 to another.

8 Mr. Hammond has also been served with and has  
9 received the benefit of an order requiring his testimony,  
10 which is akin to a subpoena when the Court issued its immunity  
11 order, which requires Mr. Hammond to testify fully,  
12 completely, and truthfully before the grand jury with immunity  
13 with respect to such testimony. Procedurally, the Court  
14 concludes that Mr. Hammond has received all the process to  
15 which he was entitled to as well as all the information  
16 pertaining to the entry of those orders.

17 I read from the filings that Mr. Hammond argues that  
18 the order to testify shall be quashed because it's not  
19 necessary. But a grand jury has broad investigative powers to  
20 determine whether a crime has been committed and who committed  
21 it and its function is to inquire into the information that  
22 might possibly bear on its investigation.

23 The witness called before the grand jury is not  
24 entitled to interfere with the course of the grand jury's  
25 inquiry or to insert objections based on the witnesses own

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1 Hammond is ordered to testify before the grand jury on  
2 Thursday, September 12th.

3 All right. Is there anything further?

4 MR. KROMBERG: Judge, may we have a moment to  
5 confer?

6 THE COURT: Yes.

7 (Counsel confers.)

8 MR. KROMBERG: So, Judge, it's possible that we're  
9 going to be -- need to be back before you tomorrow, because I  
10 think it's an open question what the witness is going to do at  
11 this point.

12 MR. ZIMMERMAN: Judge, if I might?

13 THE COURT: Yes.

14 MR. ZIMMERMAN: Susan and Sarah, are you there?

15 MS. KELLMAN: Yes. And I apologize, but we did not  
16 hear the question.

17 The sound goes in and out from time to time. We did  
18 not hear Mr. Kromberg's question.

19 MR. ZIMMERMAN: Judge --

20 THE COURT: Mr. Kromberg raised the -- I believe he  
21 said it was an open issue whether Mr. Hammond would in fact  
22 testify tomorrow and that we may need to be back here  
23 tomorrow.

24 MR. ZIMMERMAN: I think if I might, Judge, at this  
25 point --

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1 MR. KROMBERG: That will be fine, Judge. What I  
2 suggest is -- as you recall from the last time we had -- when  
3 the witness did not actually appear before the grand jury,  
4 because that seems, under the circumstances, where the witness  
5 already says they're not going to testify that might be a  
6 waste.

7 If Mr. Zimmerman, Ms. Kellman, and Ms. Kunstler say  
8 that at least at this point in September 2019 the witness is  
9 not going to testify, then perhaps we can come up here, at the  
10 Court's direction of the time, the Court could ask the  
11 witness: Are you refusing to testify? If the witness says,  
12 Yes, I refuse to testify, then we don't have to go before the  
13 grand jury at all.

14 Our grand jury time is scheduled tomorrow for  
15 2 o'clock.

16 If the witness is going to testify, that's great.  
17 That's ideal. But I would not like to have the situation  
18 occur where we don't come before you until after some time  
19 after 2 o'clock, the grand jury is dismissed for the day, they  
20 don't come back until October, and then the witness says, Oh,  
21 okay, I'll testify; because, that puts us in the position of  
22 having to wait until October for something that we believe  
23 needs to be done now.

24 So I guess what I'm asking you is we need to be  
25 before you -- if the answer is the witness is not going to

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1 posture where he wants to fully and fairly consider whether  
2 he's going to testify and he wants to do it, you know, with  
3 the lawyers that he's had for seven years.

4 And so we would submit to the Court that it makes  
5 sense to schedule the grand jury for October, and then the  
6 Government and the defense can start engaging in these  
7 discussions and we can do it with Ms. Kellman and  
8 Ms. Kunstler.

9 THE COURT: Mr. Kromberg, what kind of -- what's the  
10 time importance --

11 (Telephone disconnection.)

12 MR. KROMBERG: The reason that we were moving the  
13 way we're moving is that we -- we have time constraints on us  
14 that we're not at liberty to describe with a witness here. If  
15 it's appropriate, if the Court is interested, we can explain,  
16 but we believe it needs to be done in September, which was why  
17 we didn't agree to postpone it until January, as Ms. Kellman  
18 first asked, and we have not agreed to postpone until October.

19 If the witness declines to testify tomorrow, it's  
20 true, then the next opportunity won't be until the second week  
21 in October. We hope that doesn't happen. We hope that, as  
22 the Court says, he testifies and we get him out of here and he  
23 goes back to where he came from.

24 THE COURT: All right.

25 MR. KROMBERG: Thank you.

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1 submitted a letter to the Court asking the Court to waive the  
2 \$75 filing fee for the pro hac vice.

3 THE COURT: All right. I'll do that.

4 MR. ZIMMERMAN: Okay. Thank you, Judge.

5 THE COURT: All right. Anything else?

6 MR. KROMBERG: No, Your Honor.

7 THE COURT: All right. Thank you. Court will stand  
8 in recess.

9

10 (Proceedings adjourned at 4:37 p.m.)

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